Tan See Yin Vincent v Noone & Co & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03–56 OF 1993
EUSOFF CHIN CHIEF JUSTICE, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ
17 MARCH 1995

Civil Procedure *— Third party proceedings — Summary judgment against third party — Whether separate writ must be filed — Failure to apply and pray for summary judgment in third party summons for directions — Whether mere irregularity — Whether can be cured — Rules of the High Court 1980 O 2 r 1(1) & O 16 r 4*

Civil Procedure *— Summary judgment — Claim for indemnity — Whether defendant can seek summary judgment against co-defendant*

Civil Procedure *— Summary judgment — Allegation of fraud — Fraud in the technical sense — Whether claim actually based on fraud — Rules of the High Court 1980 O 14 r 1(2)(b)*

The appellant appealed against an order granted to the respondents, Noone & Co and Noorjehan Rahima bte Abdul Hamid Jumat, that the appellant was liable to indemnify the respondents for any sums including interest and costs which they might be ordered to pay in civil suit No D4–23–2332–87 to the plaintiff, Supreme Finance (M) Bhd ('Supreme Finance'). Supreme Finance had obtained summary judgment under O 14 of the Rules of the High Court 1980 ('RHC') against the respondents for RM11,177,228.03 with interest and costs, being money owed by Noone under a loan agreement. The appellant and Noorjehan were sued in their capacity as guarantors under the letters of guarantee. The respondents argued that, by letters of indemnity, the appellant had agreed to indemnify them against all liabilities, losses, actions, proceedings, damages and costs arising from the business of Noone. Subsequently, the respondents issued a notice under O 16 r 8(1) of the RHC followed by a summons for third party directions under O 16 r 4 against the appellant to determine the question of his liability to indemnify them. They then filed a summons-in-chambers seeking summary judgment against the appellant at which hearing the judge made the order appealed against.

In the present appeal, the appellant alleged that summary judgment under O 14 was not available to the respondents as: (i) their application in the summons-in-chambers had failed to comply with the O 14 procedure; (ii) they were seeking summary judgment against the appellant who was a co-defendant in the civil suit; and (iii) the claim against the appellant was based on an allegation tantamount to fraud and was thus excluded from summary judgment under O 14 r 1(2)(b) of the RHC.

Held, dismissing the appeal:

(1) The respondents had acted under O 16 r 4 of the RHC in seeking summary judgment against the appellant although there was an error in their application. Since the application was founded on third party proceedings claiming an indemnity against a third party, it was not necessary for the respondents to file a separate writ against the appellant. Order 16 r 4 confers on the court very wide powers to give such directions as may appear proper 'for having the rights and liabilities of the parties most conveniently determined and enforced'.

(2) The error in the respondents' application was that it did not expressly ask for judgment against the third party and, alternatively, for directions as laid down under O 16 r 4(3)(a) of the RHC. They had also equated summary judgment under O 16 r 4(3)(a) with O 14 in the grounds of their application. The failure to follow the procedure set out in O 16 r 4(3)(a) amounted to a mere irregularity as to the form and not the substance, which was failure to apply and pray for summary judgment in the alternative, in the summons for third party directions under r 4(1). These irregularities do not constitute a fundamental defect in the procedure and are, therefore, curable under O 2 r 1(1) of the RHC.

(3) A defendant who brings a counterclaim against a plaintiff and a co-defendant cannot seek summary judgment on the counterclaim against the co-defendant because he cannot serve a notice under O 16 r 8(1) of the RHC and, consequently, cannot rely on O 16 r 8(3) as a means to invoke O 16 r 4. In the instant case, the respondents' application did not involve any counterclaim against Supreme Finance or the appellant and therefore there was no merit in the appellant's proposition that summary judgment could not be granted against another defendant.

(4) In terms of O 14 r 1(2)(b) of the RHC, the plaintiff's claim must be based on an allegation of fraud in the technical sense as used in *Derry v Peek* (1889) 14 App Cas 337; [1886–90] All ER Rep 1. It was clear that from their statement of claim that the respondents did not ground their claim on the allegations of fraud or deceit on the part of the appellant and therefore, their claim did not attract the provisions of O 14 r 1(2)(b) of the RHC.

[Bahasa Malaysia summary

Perayu telah membuat rayuan terhadap satu perintah yang telah diberikan kepada responden, Noone & Co dan Noorjehan Rahima bte Abdul Hamid Jumat, bahawa perayu bertanggungjawab untuk menanggung rugi responden untuk apa-apa jumlah termasuk faedah dan kos yang responden mungkin diarah membayar di dalam guaman sivil No D4–23–2332–87 kepada plaintif, Supreme Finance (M) Bhd ('Supreme Finance'). Supreme Finance telah memperolehi satu

penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap responden untuk RM11,177,228.03 dengan faedah dan kos, yang merupakan wang yang dihutang oleh Noone di bawah suatu perjanjian pinjaman. Perayu dan Noorjehan telah didakwa sebagai penggerenti di bawah surat gerenti itu berkenaan. Responden berhujah bahawa, melalui surat tanggung rugi, perayu telah bersetuju menanggung rugi responden terhadap segala liabiliti, kerugian, tindakan, prosiding, ganti rugi dan kos yang timbul daripada perniagaan Noone. Seterusnya, responden telah mengeluarkan suatu notis di bawah A 16 k 8(1) KMT disusuli dengan saman untuk arahan pihak ketiga di bawah A 16 k 4 KMT terhadap perayu untuk menentukan soal liabiliti beliau untuk menanggung rugi mereka. Mereka kemudiannya telah memfailkan satu saman dalam kamar untuk memohon penghakiman terus terhadap perayu dan pada perbicaraannya, hakim telah membuat perintah terhadap mana rayuan ini dibuat.

Di dalam rayuan ini, perayu mengatakan bahawa responden tidak boleh memperolehi penghakiman terus di bawah A 14 kerana: (i) permohonan mereka dalam saman dalam kamar gagal mematuhi prosedur A 14; (ii) mereka memohon penghakiman terus terhadap perayu yang merupakan defendan bersama dalam tindakan sivil itu; dan (iii) tuntutan terhadap perayu adalah berasaskan kepada satu dakwaan yang sama seperti fraud dan dengan itu terkecuali daripada penghakiman terus di bawah A 14 k 1(2)(b) KMT.

Diputuskan, menolak rayuan itu:

(1) Responden telah bertindak di bawah A 16 k 4 KMT dalam meminta penghakiman terus terhadap perayu walaupun terdapat satu kesilapan dalam permohonan tersebut. Oleh kerana permohonan itu berasaskan kepada prosiding pihak ketiga yang menuntut suatu tanggung rugi terhadap pihak ketiga, adalah tidak perlu bagi reponden memfailkan suatu writ berasingan terhadap perayu. Aturan 16 k 4 memberikan mahkamah kuasa yang sangat luas untuk memberi arahan yang mungkin kelihatan wajar untuk 'memutuskan dan menguatkuasakan dengan cara yang paling sesuai sekali hak dan liabiliti pihak-pihak itu'.

(2) Kesilapan dalam permohonan responden adalah bahawa ianya tidak meminta untuk penghakiman terhadap pihak ketiga dengan nyata dan, secara alternatif, untuk arahan sepertimana yang ditetapkan di bawah A 16 k 4(3)(a) KMT. Mereka juga telah menyamakan penghakiman terus di bawah A 16 k 4(3)(a) dengan A 14 di dalam alasan permohonan mereka. Kegagalan mengikuti prosedur yang ditetapkan di A 16 k 4(3)(a) hanya merupakan suatu luar aturan mengenai bentuk dan bukan isi perkara, iaitu kegagalan membuat permohonan dan memohon untuk penghakiman terus sebagai alternatif, di dalam saman untuk arahan pihak ketiga di bawah k 4(1). Luar aturan itu tidak

merupakan satu kecacatan asas dalam prosedur tersebut dan, dengan itu, boleh di atasi mengikut A 2 k 1(1) KMT.

(3) Seseorang defendan yang membawa suatu tuntutan balas terhadap seorang plaintif dan seorang defendan bersama tidak boleh memohon penghakiman terus atas tuntutan balas itu terhadap defendan bersama kerana beliau tidak boleh menyerahkan notis di bawah A 16 k 8(1) KMT dan, seterusnya, tidak boleh bergantung pada A 16 k 8(3) sebagai suatu cara menggunakan A 16 k 4. Dalam kes ini, permohonan responden tidak melibatkan apa-apa tuntutan balas terhadap Supreme Finance ataupun perayu dan, dengan itu, tidak terdapat merit di dalam saranan perayu bahawa penghakiman terus tidak boleh dibenarkan terhadap seorang defendan lain.

(4) Dari segi A 14 k 1(2)(b) KMT, tuntutan plaintif mesti berasaskan kepada dakwaan fraud dalam ertikata teknikal seperti yang digunakan dalam *Derry v Peek* (1889) 14 App Cas 337; [1886–90] All ER Rep 1. Adalah jelas daripada penyata tuntutan mereka bahawa responden tidak mengasaskan tuntutan mereka atas dakwaan bahawa fraud telah dilakukan oleh perayu dan dengan itu, tuntutan mereka tidak menarik peruntukan A 14 k 1(2)(b) KMT.]

Notes

For cases on summary judgment against a third party, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3543–3544.

For a case on summary judgment involving an allegation of fraud, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3214.

Cases referred to

Banbury v Bank of Montreal [1918] AC 626; [1918–19] All ER Rep 1 (folld)

Barclays Bank Ltd v Cole [1967] 2 QB 738; [1966] 3 All ER 948; [1967] 2 WLR 166 (folld)

Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd [1990] 2 MLJ 385 (folld)

CE Heath v Ceram Holding Co & Anor [1989] 1 All ER 203; [1988] 1 WLR 1219 (distd)

Derry v Peek (1889) 14 App Cas 337; [1886–90] All ER Rep 1 (folld)

Newton Chemical Ltd & Ors v Arsenis [1989] 1 WLR 1297 (folld)

Stafford Winfield Cook & Partners Ltd v Winfield [1980] 3 All ER 759; [1981] 1 WLR 458 (folld)

Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (folld)

Legislation referred to

Rules of the High Court 1980 O 2 r 1, O 14 r 1(2)(b), O 16 rr 4(3)(a), (4), 8(1), (3), O 18 r 1

A Rules of the Supreme Court O 14 [Eng]
Theft Act 1968 s 17(1)(a) [UK]

Appeal from: Civil Suit No D4–23–2332–87 (High Court, Kuala Lumpur)

B *Manjit Singh* (*Sri Ram & Co*) for the appellant.
K Anantham (*Skrine & Co*) for the respondents.

Cur Adv Vult

C **Mohamed Dzaiddin FCJ** (delivering the judgment of the court): This is an appeal by the third party from an order of Siti Norma Yaakob J dated 11 May 1992 whereby she granted an application by the first and fourth defendants, the respondents before us, for a declaration that the third party was liable to indemnify the respondents for any sums including interests and costs which the latter might be ordered to pay to the plaintiff
D in the instant civil suit.

Background

For the purpose of the present appeal, it is necessary to recap briefly the chronology of events leading to the hearing of the respondents' application
E for declaratory orders and summary judgment against the appellant. On 4 July 1987, the plaintiff filed a suit in the commercial division of the Kuala Lumpur High Court against the defendants for judgment in the sum of RM11,177,228.03 with interest and costs, being money owed by the first defendant under a loan agreement dated 10 October 1985. The
F second, third and fourth defendants were sued in their capacity as guarantors under the letters of guarantee of even date. On 16 September 1988, the first and fourth defendants ('the respondents') filed a joint defence to the plaintiff's claim denying any liability on their part, mainly on the grounds that the loan agreement was invalid and that the money was disbursed contrary to certain provisions/clauses of the said agreement. They also
G alleged that the money which was intended to be used as a working capital for the first defendant never reached the company but was used by the second defendant ('the appellant') for his personal benefit. In this regard, it was alleged that he, being at all material times the chief executive officer of the first defendant, was in de facto control of the company. In addition,
H they alleged that, by letters of indemnity dated 10 October 1985 and 31 October 1986, the appellant had agreed to indemnify the respondents against all liabilities, losses, actions, proceedings, damages and costs arising from the business of the first defendant.

It should perhaps be mentioned here that on 25 May 1989, the
I plaintiff filed an application for O 14 judgment against the appellant and respondents. Subsequently, summary judgment was ordered against the respondents thereby rendering the trial of the main action unnecessary.

On 5 October 1989, the respondents issued a notice under O 16 r 8(1) of the Rules of the High Court 1980 ('the RHC') claiming to be

indemnified against the plaintiff's claim with interests and costs under the main suit. The notice was served on the appellant on 17 October 1989. This was followed by the filing on 27 February 1990 of the summons for third party directions against the appellant as the third party in Form 26 of the RHC, for an order that the respondents serve a statement of their claim on the third party within 14 days, who will plead thereto within 14 days and who will be at liberty to appear and defend the action, and for the question of the liability of the third party to indemnify the respondents be tried. Quite obviously, this application for directions was made under O 16 r 4 of the RHC. On 16 March 1990, the registrar made an order in term. On 30 March 1990, the respondents filed their statement of claim pursuant to the aforesaid directions and served the same on the appellant.

On 18 May 1990, the appellant filed his defence denying the allegations contained in the statement of claim and averred that by letter dated 31 October 1986, he was discharged from all liabilities under the letters of indemnity. In the premises, he contended that the respondents had no reasonable cause of action and their claim was frivolous, vexatious and an abuse of the process of the court.

More than a year later, on 10 June 1991, the respondents filed the summons-in-chambers, the subject matter of the appeal, seeking summary judgment against the appellant. It came up for hearing before the learned judge on 11 May 1992. After hearing counsel, the learned judge made an order of declaration that the appellant was liable to indemnify the respondents of any sums including interest and costs which they might be ordered to pay in the instant suit. Following the aforesaid order, the respondents proceeded to obtain judgment against the appellant for recovery of the amount which they had paid to the plaintiff in the main action. It seemed that there was no appeal against the said judgment. For the sake of completeness, we reproduce below the summons-in-chambers:

Summons-in-chambers

Let all parties concerned attend before the senior assistant registrar in chambers on Thursday 16 July 1991 at 9am, on the hearing of an application on the part of the first and fourth defendants abovenamed for the following orders:

(a) a declaration that the third party is liable to indemnify the first and fourth defendants of any sums including interest and costs which the first and fourth defendants may be ordered to pay to the plaintiff in the abovenamed Kuala Lumpur High Court Suit No D4–23–2332–87;

(b) judgment for any sums including costs and interest which may be found due from the first and fourth defendants to the plaintiff in the abovenamed Kuala Lumpur High Court Suit No D4–23–2332–87;

(c) an order that the costs be paid by the third party including all costs that the first and fourth defendants may be ordered to pay the plaintiff in defending the plaintiff's action and the cost of third party proceedings; [and]

(d) alternatively, that the defence of the third party herein be struck out and that judgment as above-mentioned be entered in favour of the first and fourth defendants.

A The grounds of the application are:

(1) that *the third party herein has no defence to the first and fourth defendants' claim and* the first and fourth defendants *are accordingly entitled to judgment under O 14 of the Rules of the High Court 1980*; or

(2) alternatively, that the defence of the third party herein be struck out and that judgment be entered in favour of the first and fourth defendants in exercise of the inherent jurisdiction of the court and pursuant to O 18 r 19 of the Rules of the High Court 1980 on the grounds that the defence does not disclose a defence to the first and fourth defendants' claim and is frivolous and vexatious and filed with a view to delay the fair trial of this action and is an abuse of the process of the court. (Emphasis added.)

Issues

Based on the memorandum of appeal and the summary of grounds of appeal, it appears to us that there is only one issue which arises for decision, which is, whether, on the face of the summons-in-chambers dated 10 June 1991, the learned judge erred in granting summary judgment against the appellant which failed to comply with O 14 procedures. However, at the outset of the hearing of this appeal, Encik Manjit, counsel for the appellant, applied for leave to raise another ground on a point of law which was not argued below, which he contended affected the jurisdiction of the court. Despite a feeble objection from Encik Anantham, for the respondents, we allowed the application. In doing so, we adopted the observations of Lord Parker and Lord Wrenbury in *Banbury v Bank of Montreal* [1918] AC 626; [1918–19] All ER Rep 1, which was followed by the Federal Court in *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction and if it would result in the rectification of an erroneous order. The legal question is whether, in the circumstances of the present case, non-compliance with the procedures under O 16 r 4 of the RHC amounts to an irregularity or a nullity as affecting the jurisdiction of the court below to grant the summary declaratory order. Alternatively, that the learned judge's order of 11 May 1992 is a nullity because it is contrary to the registrar's order made pursuant to the third party directions dated 16 March 1990.

The submission of Encik Manjit on the first ground may be stated in the following proposition, viz that as the respondents are seeking summary judgment on a declaratory order against the appellant under O 14 of the RHC, the court has no power to grant the order when the respondents' application fails to comply with O 14 procedures. It appears that the approach taken by counsel in his argument was to treat the above summons-in-chambers of 10 June 1991 as an application for summary judgment under O 14 of the RHC. We think he must have been influenced by the words 'entitled to summary judgment under O 14' appearing under ground (1) of the summons. Thus, the following submissions were made on the footing that the court's jurisdiction to grant summary judgment was only confined to O 14 procedures. First, counsel contended that the respondents'

application in the summons-in-chambers was essentially for summary judgment. The application was based on the summons for third party directions and not on any writ. The statement of claim was filed by the respondents against the appellant pursuant to the order granted under the summons for third party directions. Therefore, in the circumstances, O 14 could not apply here because the respondents' application was never begun by writ. Secondly, he contended that summary judgment under O 14 could not be granted to a defendant against a co-defendant. Thirdly, counsel submitted that the respondents' claim against the appellant in the statement of claim is based on allegations tantamount to fraud. In this regard, we were referred to the paragraphs in the statement of claim, in particular paras 5, 6 and 7, which alleged misrepresentation and conspiracy on the part of the third party in respect of the utilization of the loan given by the plaintiff to the first defendant. In the words of learned counsel, they are allegations tantamount to fraud.

On the first point, we wish to reiterate that counsel's argument was based on the premise that since the respondents' application was for summary judgment under O 14, they must, therefore, comply with the procedures under the RHC. The application must be founded on a writ. However, from the chronology of events referred to earlier, we are satisfied that the respondents had acted under O 16 r 4 in seeking summary judgment against the appellant although, at this juncture, we pause to say that there was an error in the application. Since the application is founded on third party proceedings claiming indemnity against a third party, it is not necessary for the respondents to file a separate writ against the appellant. According to 1 *Supreme Court Practice 1991* at p 242 para 16/1/1:

> The service of the third party notice, and the issue of contribution between co-defendants in an appropriate case, creates a 'lis' between the parties in question, which remains to be disposed of, if necessary by determination by the court ... Indeed, generally speaking, a defendant and a third party stand in relation to one another as if the defendant had brought a separate action against the third party ....

Next, Encik Manjit submitted this summary procedure is not available to the respondents who are seeking summary judgment against the appellant, who is their co-defendant in the main action. He relied on *CE Heath v Ceram Holding Co & Anor*; [1989] 1 All ER 203; [1988] 1 WLR 1219 CA. The headnote of the case reads as follows ([1988] 1 WLR 1219):

> The court's jurisdiction to grant summary judgment to a party to the proceedings is confined to the powers granted by the Rules of Court and RSC O 16 r 8, which governs claims made by a defendant to an action, makes no provision for claims that were or should be made by counterclaim and, therefore, in the absence of specific authority in O 14, there is no procedure in the Rules by which a defendant can obtain summary judgment on a counterclaim against a co-defendant.
>
> Where, therefore, the second defendants to the action issued a summons for summary judgment on their counterclaim against the first defendants and the first defendants appealed against the order entering judgment against them:

A Held, that the appeal would be allowed and the second defendants' summons would be struck out.

Since this case was relied on strongly by the appellant's counsel, we should examine the facts and finding of the court in more detail. The plaintiffs had claimed against the first defendants to be entitled to moneys provided B by the first defendants by way of security. The defence was that the plaintiffs' claim was tainted with illegality on the ground that the transaction was designed to defraud the creditors of the second defendants. The second defendants then applied to be joined as a party and they counterclaimed against both the plaintiffs and the first defendants. Since the plaintiffs and the second defendants had settled the matter, the second C defendants issued a summons for summary judgment against the first defendants. The first defendants applied to strike out the summons on the ground that there was no procedural basis for an application for summary judgment in the circumstances of the case. The application was dismissed. The first defendants appealed. The question which arose for decision in D the case was whether one of the two defendants who made a *counterclaim* against the plaintiffs and the other defendant could obtain summary judgment against the other defendant. See [1989] 1 All ER 203 at p 204; [1988] 1 WLR 1219 at p 1221.

Neill LJ, delivering the judgment of the court, stated ([1989] 1 All E ER 203 at pp 211–212; [1988] 1 WLR 1219 at p 1230):

> Prima facie, therefore, O 16 r 8(2) applies to the claim by the second defendants against the first defendants. The claim not only 'could have been made' by counterclaim, but was in fact so made by the second defendants.
>
> There is no doubt that if the claim by the second defendants had been F against the first defendant alone, they could have taken advantage of the procedure available under O 16 r 4. This right to seek summary judgment against a co-defendant has been available for over 100 years. Moreover, it was accepted on behalf of the first defendant that, in the absence of O 16 r 8(2), the second defendants could, if they had wished, sought summary judgment against the plaintiffs under O 14 r 5(1) and against the first G defendants under O 16 rr 8 and 4.
>
> The central question is whether the procedure set out in r 4 can be used for the determination of the claim by the second defendants against the first defendants. This procedure can only be used if a notice falling within the description 'such a notice' in r 8(3) has been served. 'Such a notice' in r 8(3) must mean, in my view, a notice served in accordance with r 8(1). H But by the express words of r 8(2), r 8(1) does not apply, and therefore a notice under it cannot be served, where the claim by the defendant 'could be made' by counterclaim. Rule 8(2) would seem to apply a fortiori where a claim *has been made* by counterclaim. [Emphasis provided.]
>
> I see no escape from the express words of r 8(2). The route to summary I judgment by rr 8(3) and 4(3) is closed. No other route is open.
>
> Accordingly, and not without regret, I feel bound to say that the appeal should be allowed.

It is clear to us that the above case is only an authority for the proposition that a defendant who brings a *counterclaim* against a plaintiff and a co-

defendant cannot seek summary judgment on the *counterclaim* against the co-defendant because he cannot serve a notice under O 16 r 8(1) and, consequently, cannot rely on r 8(3) as a means to invoke O 16 r 4. But, in the instant case, the respondents' application does not involve any counterclaim against the plaintiffs or the appellant. Therefore, the principle in *CE Heath* does not apply here. In the result, we find no merit in counsel's proposition that summary judgment could not be granted to a defendant against another defendant. In fact, 'this right to seek summary judgment against a co-defendant has been available for over 100 years' (per Neill LJ, supra).

The remaining question is whether the respondents' application is based, in the words of Encik Manjit, on an allegation tantamount to fraud. This issue may no longer be relevant since the central issue in this appeal concerns an application for summary judgment under O 16 r 4 and not O 14. Nonetheless, it must be made clear that in terms of O 14 r 1(2)(b) of the RHC, the plaintiff's claim must be based on an allegation of fraud, which means fraud in the technical sense as used in *Derry v Peek* (1889) 14 App Cas 337; [1886–90] All ER Rep 1. See *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1990] 2 MLJ 385; *Barclays Bank Ltd v Cole* [1967] 2 QB 738 at p 744; [1966] 3 All ER 948 at p 950; [1967] 2 WLR 166 at p 169. In *Stafford Winfield Cook & Partners Ltd v Winfield* [1980] 3 All ER 759 at p 766; [1981] 1 WLR 458 at p 466, Megarry VC said:

> ... the word 'fraud' is used not in any general sense of dishonesty, but as meaning an intentional misrepresentation (or in some cases concealment) of fact made by one party with the intention of inducing another party to act on it, and thereby inducing the other party to act on it to his detriment. In other words, 'fraud' means 'fraud' in the sense of *Derry v Peek* (1889) 14 App Cas 337; [1886–90] All ER Rep 1.

In *Newton Chemical Ltd & Ors v Arsenis* [1989] 1 WLR 1297, reading from the headnote, the plaintiffs, manufacturers of toiletry products, engaged the defendant as a self-employed sales representative in 1984 and paid him on a commission basis. In 1987, the plaintiffs discovered that the defendant had been fabricating orders from retail chemists and they commenced proceedings against him for repayment of commission and for sums in respect of 'bonus' goods to which the defendant had had access. In subsequent criminal proceedings in respect of those matters, the defendant pleaded guilty to a number of charges of false accounting contrary to s 17(1)(a) of the Theft Act 1968. In their statement of claim, the plaintiffs alleged the existence of an oral agreement between the parties whereunder the defendant would be paid, and would only claim payment of, commission on sales actually effected by him. The plaintiffs further claimed that the defendant owed fiduciary duties to them. The allegations made by the plaintiffs in their claim against the defendant were based solely on his breaches of contract and fiduciary duty and his negligence and did not make any claim for damages for fraud or deceit. The plaintiffs took out a summons for summary judgment against the defendant under the provisions of O 14 of the Rules of the Supreme Court 1965. The defendant resisted having judgment entered against him on the ground that the plaintiffs'

A statement of claim 'was based on an allegation of fraud' against him and they were accordingly precluded under O 14 r 1(2)(b) from obtaining summary judgment. The judge on the hearing of the summons upheld the defendant's case and refused the plaintiffs' application.

On appeal by the plaintiffs, the Court of Appeal held, allowing the B appeal, that the exclusion contained in O 14 r 1(2)(b) was directed at and confined to actions based on a claim founded on fraud as strictly defined in *Derry v Peek*, namely a false representation made knowingly without belief in its truth. It was further held that although the plaintiffs' statement of claim contained an averment of all the essential factual ingredients of such fraud, they had expressly chosen to found their action on breach of C contract and fiduciary duty and negligence and not on fraud, and to succeed with the claims as pleaded, the plaintiffs did not have to prove that the defendant had acted dishonestly.

The Court of Appeal held that the plaintiffs were not precluded by O 14 r 1(2)(b) from obtaining summary judgment against the defendant.

D In the instant case, the allegations in the respondents' statement of claim against the appellant must be viewed in the light of their lengthy defence filed in the main action where the cause of action is based on a breach of contract, ie for breaches of the loan agreement. It will be noted that para 4 of the statement of claim alleges that the appellant had E intentionally and wrongfully caused the first defendant to execute the loan agreement by representing that the money was to be used as the working capital, although at all material times it was intended by him to be for his own private use and benefit. Under the 'particulars', it is averred that the appellant conspired with one Tan Koon Swan in manipulating the first defendant into executing the said loan agreement. Paragraph 5 merely F reaffirms the allegation in para 4 wherein the expression 'acted in his self interest and conspired or schemed to manoeuvre the loan for his private benefit and enrichment' is used. Paragraph 6 alleges that the appellant had unduly influenced or deceived the fourth defendant into executing the letter of guarantee which led her to believe that the loan was given solely G for the benefit of the first defendant. Finally, in the prayer for relief in para 8, ie a declaration for indemnity against the appellant, it is clear to us that the respondents did not ground their claim on the allegations of fraud or deceit on the part of the appellant. Thus, we find that none of the above-mentioned paragraphs contain an averment of the essential ingredients of fraud in the sense of *Derry v Peek*, eg a false misrepresentation, H although we recognize that the words 'conspired' and 'deceived' were used. Following the above authorities, we hold that the respondents' statement of claim does not attract the provision of O 14 r 1(2)(b) of the RHC.

In our judgment, counsel's submission on the first ground must fail.

I With respect to the second ground raised by Encik Manjit, his complaint was that the respondents had adopted a wrong procedure in seeking summary judgment against the appellant. As we understand him, he was not complaining that the respondents could not act under O 16

r 4 to obtain summary judgment against the respondents. But, what he questioned was that since they expected to establish the liability of the third party under the indemnity, they should have expressly asked for judgment to be entered against the appellant on the hearing of the application for third party directions. Instead, they filed a separate summons-in-chambers seeking a declaration for liability and summary judgment under O 14. In the circumstances, counsel submitted that the respondents must follow the procedure set out in O 16 r 4(3)(a), as failure to do so would render the proceedings and any orders made thereunder a nullity.

Encik Anantham submitted that from the chronology of events, it was obvious that the respondents had acted under O 16 r 4 and not O 14 of the RHC in seeking summary judgment against the appellant since the application was commenced after giving a notice dated 5 October 1989 to the appellant under O 16 r 8(1) claiming liability under the indemnity, and followed by the filing of the summons for third party directions under O 16 r 4. Counsel, however, conceded that there was an error in the application when it was prayed under ground (1) that the respondents were entitled to judgment under O 14 of the RHC. According to him, the solicitors were relying on the commentary in 37 *Atkin's Court Forms* (2nd Ed) ('*Atkins*'), under 'Summary judgment against third party' (at p 342), whereby they equated the reference to summary judgment therein with summary judgment under O 14. Nevertheless, counsel submitted that the above mistake should only be treated as an irregularity and not a nullity for the following reasons. Failure to comply with the rules amounts to a nullity only if what is done cannot be done, at all, under the RHC. He gave an example as in *CE Heath* [1989] 1 All ER 203; [1988] 1 WLR 1219, where the action of the second defendant in seeking summary judgment was brought under O 16 r 4 when on the facts of the case, he could not issue a notice under O 18 r 1 and consequently could not invoke O 16 r 4. In the instant case, the respondents may have invoked the wrong rule, but summary judgment was clearly a relief which was open to the respondents against the appellant. Secondly, counsel submitted that the court should do what is reasonable and proper to prevent injustice in cases of non-compliance with the RHC. In the instant case, we were reminded that there could not be any injustice to the appellant because the trial of the action was no longer necessary since the plaintiff had obtained judgment against the respondents and the latter, in turn, had obtained judgment against the appellant who had not appealed against the said judgment. Thirdly, any irregularity in complying with the rules can be waived. The fact that the appellant is represented by counsel who participated in the proceedings with knowledge of the irregularity in the application amounts to a waiver of the irregularity of the proceedings.

As for the alternative ground, counsel explained that after the respondents had obtained the third party directions, there had been a material development in the case in that the plaintiff had obtained judgment against the respondents thereby rendering a trial of the main action to be no longer necessary. Accordingly, the directions made by the registrar ceased to be applicable to the knowledge of the appellant. Moreover, since

A the judge's order of 11 May 1992, judgment had also been obtained by the respondents against the appellant for the same amount that the respondents had paid to the plaintiff and the appellant had not appealed against that judgment.

In considering the second ground of appeal, our approach is to look B at the substance rather than the form of the application, the subject matter of the appeal. On the hearing of the summons for third party directions, the court has wide powers generally to make such orders and give such directions as appear proper for having the rights and liabilities of the parties most conveniently determined and enforced — O 16 r 4(4). Among the orders and directions which it may make are to dismiss the summons C for third party directions; to give the defendant summary judgment against the third party; to order any claim, question or issue stated in the notice be tried in such manner as the court may direct; and to give the third party leave to defend the action. In the case of an order for summary judgment against the third party, O 16 r 4(3)(a) provides:

D

> On an application for directions under this rule the Court may —
>
> (a) if the liability of the third party to the defendant who issued the third party notice is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant; or
>
> E ...
>
> and may do so either before or after any judgment in the action has been signed by the plaintiff against the defendant.

The procedure to be adopted is stated in *Atkin's* at p 342:

> F Where the defendant seeks to apply for summary judgment against the third party, he should specifically ask for such an order in the alternative in his summons for third party directions, and he should, by analogy with a summons for summary judgment under the Rules of the Supreme Court Order 14, support his application by affidavit evidence, exhibiting all relevant documents tending to 'establish' the third party's liability on his claim or that the third party has no defence to his claim.

G Looking at the respondents' application, it is clear to us that the respondents did not follow the procedure laid down under r 4(3)(a) as explained in the above passage and the precedent in Form 10 of *Atkin's* (at p 380). In our view, the procedure adopted by the respondents is irregular. Instead of asking in the summons for third party directions for an order that they be H at liberty to enter judgment against the appellant under the indemnity and alternatively for third party directions, the respondents filed a separate application seeking summary judgment against the appellant on the ground that the appellant has no defence to their claim and accordingly entitled to judgment under O 14 of the RHC. Order 16 r 4(3)(a) clearly provides for the procedure for summary judgment on the third party summons for I directions where a defendant expects to establish the liability of the third party on the hearing of the summons for directions, in which case, the application should expressly ask for judgment against the third party and alternatively for directions (1 *Supreme Court Practice 1991* at p 253

para 16/4/10). The issue here is whether failure to follow the procedure set out in r 4(3)(a) amounts to an irregularity or nullity. We think it is a mere irregularity as to the form and not the substance, which is, failure to apply and pray for summary judgment in the alternative, in the summons for third party directions under r 4(1). No doubt, the other defect is in equating summary judgment under O 16 r 4(3)(a) with O 14 in the grounds of the application. But this error has been explained by the respondents' counsel, whose explanation we accept without any fuss. These irregularities do not constitute a fundamental defect in procedure and are therefore curable under O 2 r 1(1) of the RHC. The power given to the court by O 2 r 1 is a power to cure irregularities consisting of failure to comply with the rules. 'The authorities taken as a whole show that O 2 r 1 should be applied liberally in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules of procedure' (1 *Supreme Court Practice 1991* at p 10). Moreover since in the instant case, the respondents were acting under O 16 r 4 in seeking summary judgment, this rule confers on the court very wide powers to make such orders and give such directions as may appear proper 'for having the rights and liabilities of the parties most conveniently determined and enforced' (O 16 r 4(4)). For ourselves, considering the facts and circumstances of the case, we would have granted a similar order as that given by the learned judge. With regard to the alternative ground, we accept the explanation of the respondent's counsel. For reasons stated above, the second ground of appeal must also fail.

Accordingly, we dismiss this appeal with costs. Deposit to be paid to the respondents to account for taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim